**Draft - Minutes**
**Hair Microscopy Subcommittee of the**
**Forensic Science Board**
**March 17, 2016**
**Department of Forensic Science, Central Laboratory, Classroom 1**

**Subcommittee Members Present**

Vince S. Donoghue, Essex Commonwealth's Attorney and Designee of Senator Mark D. Obenshain, Chair of the Senate Courts of Justice Committee (Subcommittee Chair)
David A. C. Long, Esq.
Lieutenant Colonel Robert B. Northern, Deputy Superintendent, Virginia State Police, and Designee of Colonel W. Steven Flaherty, Superintendent, Virginia State Police

**Staff Members Present**

Amy M. Curtis, Department Counsel
Katya N. Herndon, Chief Deputy Director
Linda C. Jackson, Department Director
Alka B. Lohmann, Director of Technical Services
M. Scott Maye, Chemistry Program Manager
Robert W. Scanlon, Principal Forensic Scientist
Carisa M. Studer, Legal Assistant

**Invited Guests Present**

Matthew Dullaghan, Senior Assistant Attorney General
Jae K. Davenport, Virginia Indigent Defense Commission (IDC)

**Call to Order by Subcommittee Chair Vince Donoghue**

Mr. Donoghue called the meeting of the Hair Microscopy Subcommittee ("Subcommittee") to order at 1:30 p.m. He welcomed the Subcommittee members, the invited guests and Department of Forensic Science ("DFS or the Department") Staff.

**Adoption of Agenda**

The Chair asked if there were any additions or changes to the draft agenda for the meeting. Being none, Lt. Col. Northern made a motion to adopt the agenda, which was seconded by Mr. Long and adopted by unanimous vote of the Subcommittee.

**Discussion**

The Forensic Science Board ("Board") created the Hair Microscopy Subcommittee at its January 6, 2016 meeting after hearing a presentation about the Hair Microscopy Case Review being undertaken by the Texas Forensic Science Commission (TFSC). Lynn Robitaille-Garcia, General Counsel of TFSC, spoke to the Board via conference call on the process utilized by

TFSC to review hair microscopy cases and the criteria adopted for the review of trial testimony from hair microscopy examiners. The Subcommittee was also reminded of the joint review by the Federal Bureau of Investigation (FBI) and the U.S. Department of Justice of FBI microscopic hair comparison cases.

Robert W. Scanlon, Forensic Biology Principal Forensic Scientist and former DFS hair examiner, gave a presentation on microscopic hair examinations, including the differences between hairs and fibers and an explanation of the characteristics of hair and the stages of hair growth. Before the Department had the capability to conduct DNA (PCR) examinations, the Forensic Biology Section would conduct visual and microscopic comparisons on hairs and natural fibers. The Trace Section conducted examinations on synthetic fibers. In the mid-1990s, the Forensic Biology Section began conducting DNA analysis on hair roots (where tissue was present), and at that time, the responsibility for conducting microscopic hair comparisons was transferred to the Trace Evidence Section. Mr. Scanlon provided examples of how the results of hair examinations were reported by the Department, and he generally described areas of testimony for hair examiners.

The Subcommittee discussed the need to formulate procedures for a hair microscopy case review. The first phase of the process would be the identification of cases that would need to be reviewed. Ms. Curtis explained to the Subcommittee that hair microscopy cases completed by DFS from 1995 to the present could be identified by the Department using its Laboratory Information Management System (LIMS). Cases prior to 1995, however, would require more research because LIMS did not exist until 1995.

The Subcommittee was reminded of and provided an update on the archived case file project. DFS created a database to enter information on historical cases, and two wage employees are scanning the historical certificates of analysis and entering case information into the database. However, this process is cumbersome and time consuming, and a review of hair comparison cases cannot wait for its completion. There are approximately 1 million historical (pre-LIMS) case files. To date, approximately 7,000 historical cases have been entered into the database.

The Subcommittee discussed ideas on how to identify cases in which there was testimony by DFS examiners involving hair comparisons. The Subcommittee discussed resources that could be utilized to assist in identifying such cases, including legal research engines (e.g., Westlaw and Lexis), as well as assistance from local bar associations, Commonwealth's Attorneys and law schools. There was discussion about notifying legal publications, such as Virginia Lawyers Weekly, to further spread the word to the legal community.

There was also a discussion about prioritizing the review of capital cases where the death penalty was imposed. Ms. Curtis informed the Subcommittee that DFS had already identified and pulled Department case files in those matters for potential review. Matthew Dullaghan, Senior Assistant Attorney General, informed the Subcommittee that the Attorney General's Office had reviewed all death penalty cases upon initially being notified of the FBI's review of hair comparison testimony. Mr. Dullaghan indicated that only one death penalty case involved hair comparison testimony and that, in that case, the hair comparison testimony had been exculpatory.

The Subcommittee will recommend to the Board that a letter be sent out to Bar groups and others soliciting information to assist in identifying DFS cases in which hair comparison testimony was presented, and the defendant was convicted. The letter will be sent out under the Board Chair's signature. Staff was asked to prepare a draft letter for the Subcommittee's consideration at its next meeting.

The Subcommittee then discussed the second phase of the review process, which will involve an initial screening of the cases identified as having testimony from a hair examiner. The initial screening phase will involve a determination as to whether the suspect was convicted. Also, research would need to be conducted to locate any available transcripts or factual summaries of trial proceedings.

The Subcommittee discussed the need for a checklist for use during the initial screening process. The Subcommittee agreed that cases identified with incarcerated defendants should be prioritized. DFS staff was asked to prepare a draft checklist for the Subcommittee's review at the next meeting.

The Subcommittee briefly discussed a third phase of the review process, which would involve the transcript review. Hair comparison cases identified where the defendant was found guilty and a hair examiner testified regarding a hair comparison would undergo a thorough review. The Subcommittee proposed that the review team include two prosecutors and two defense attorneys (one from private practice and one from a public defender's office). Guidelines for the review team to use when evaluating each case will be discussed at the next Subcommittee meeting. All individuals assisting in the initial screening process and the review team members will sign a confidentiality agreement before reviewing the Department's case file records. DFS staff will be available for technical questions but will not serve as members of the review team.

The Subcommittee recommended that, if the review team determined that there was an issue with a certificate of analysis or the testimony of a hair examiner, the review team would send any needed notifications to interested parties, to include the Department, the Commonwealth's Attorney, the defense attorney, the defendant, and the Court. If the review team is unable to reach a consensus whether there was an issue in a case (i.e., there was a tie vote), the Subcommittee recommended that notifications be made in the case.

Based on the Subcommittee's discussion of the proposed procedures for the hair microscopy case review, the Chair asked DFS staff for assistance in creating the checklists and review criteria for the first two phases of the process. DFS staff was asked to forward the transcript criteria utilized by TFSC and the FBI for further consideration by the Subcommittee. DFS staff will also create a confidentiality agreement for review participants. The Subcommittee will meet again before the next Board meeting to finalize the review process and the recommendations it will to present to the Forensic Science Board for approval.

**Public Comment**

Jae K. Davenport, IDC, commented that she would report back to the IDC that procedures for a hair microscopy case review process are in process.

Katya Herndon, Chief Deputy Director, shared comments from Shawn Armbrust, Executive Director of the Mid-Atlantic Innocence Project, who was not able to attend the meeting. Ms. Armbrust wanted to make the Subcommittee aware that most of the cases will not be DNA and/or innocence claims, but will instead involve constitutional claims. She also wanted to point out that, with the FBI review, the Department of Justice agreed to waive procedural bars to litigating these cases, and requested that such a waiver be considered in Virginia.

Ms. Curtis read an email from Brandon Garrett, the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia, School of Law, who was also unable to attend the meeting. Mr. Garrett recommended that the Subcommittee consider the FBI's use of outside groups to help in the case review and the FBI's clear criteria for evaluating cases. He hoped the Subcommittee would consider using the FBI criteria given that they were sensible and had already been vetted.

**Next Meeting**

The Hair Microscopy Subcommittee will meet next on Tuesday, April 19, 2016 at 1:30 p.m.

**Adjournment**

Mr. Long moved that the meeting of the Subcommittee be adjourned, which was seconded by Lt. Col. Northern and passed by unanimous vote.

The meeting adjourned at 3:15 p.m.